Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

MARY JOHNSON, Individually and as Representative of the Estate of Billy D. Johnson, Deceased,

*Petitioner,*

*v.*

H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL PRACTICE MANAGEMENT SERVICES, INC., d/b/a METHODIST MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC, and METHODIST HOSPITAL, LUBBOCK, TEXAS d/b/a HODGES CANCER CENTER,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS, SEVENTH DISTRICT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals' construction of Texas Revised Civil Statute article 4590i, § 6.02, commonly referred to as the Informed Consent Statute, deprives Johnson of his United States and Texas constitutional right to refuse medical treatment and is in violation of the Open Courts Provision of the Texas Constitution restricting his common law cause of action for fraud.

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## OPINIONS BELOW

The prior opinion of the Texas Court of Appeals, Seventh District, entered December 13, 2000, is unpublished, and is reprinted in the Appendix to this Petition. The Judgment Nunc Pro Tunc and Order of Severance, wherein the trial court granted the motions for summary judgment of H. Grant Taylor, M.D., Methodist Medical Group, and Hodges Cancer Center, was signed by the trial court on July 21, 1999, and is reprinted in the Appendix to this Petition.

## STATEMENT OF JURISDICTION

This case involves the validity and construction of a statute of the State of Texas. The judgment of the Supreme Court of Texas denying Petitioner's Petition for Review was entered on May 17, 2001, and is reprinted in the Appendix to this Petition. The judgment of the Supreme Court of Texas denying Petitioner's Motion for Rehearing on Petition for Review was entered on July 12, 2001, and is reprinted in the Appendix to this Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

This case involves similar provisions to the Texas State Constitution, which read as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. I, § 13.

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

TEX. CONST. art. I, § 19.

This case also involves the interpretation by the Texas Court of Appeals of Texas Revised Civil Statute Annotated 4590i, § 6.02, which reads as follows:

> In a suit against a physician or health care provider involving a health care liability claim that is based

> on the failure of the physician or health care provider to disclosure or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.02 (Vernon Supp. 2001).

## STATEMENT OF THE CASE

*The facts*. This is a suit for common law fraud and under the Texas Deceptive Trade Practices Act for the Respondents' misrepresentation, failure to disclose information and/or unconscionable course of action. (CR 1:3-6). Mary Johnson's decedent, Billy D. Johnson, was diagnosed with metastatic adenocarcinoma with unknown primary in February, 1996. (CR 1:104-05; 125). Mr. Johnson died from the disease on September 23, 1996. (CR 1:144). Respondents H. Grant Taylor, M.D. and Lubbock Methodist Hospital Practice Management Services, Inc. d/b/a Methodist Hospital Group d/b/a Lubbock Diagnostic Clinic, while appropriately taking steps to see if a primary tumor could be found, did not tell Mr. Johnson of his prognosis, but instead referred him to Respondent Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer Center of Methodist Hospital for radiation therapy. (CR 1:105, 107, 127-29, 132-34, 145, 162-66, 168, 254). At the same time, Taylor referred Mr. Johnson to MD Anderson's Dr. Renato Lenzi, M.D. (CR 1:162-66). Unbeknownst to the Johnsons, Lenzi's program involved

adenocarcinoma investigational studies for terminal patients. (CR 2:489). The Johnsons did not go to Houston. (CR 1:163) Taylor did not conduct further studies to find the primary tumor. (CR 1:171). The planned radiation therapy, however, as shown by Hodges records, was not intended to be curative, but "palliative." (CR 1:115) Although there is no treatment for metastatic adenocarcinoma with unknown primary, neither the patient nor his family were notified of the patient's poor prognosis and that the treatment intent was "palliative" only. (CR 1:108, 115, 133, 145). A "palliative" intent in cancer therapy is to relieve the patient of symptoms, but does not provide a cure of the primary lesion or tumor (CR 1:44).[1] Taylor claimed he would tell terminal cancer patients he referred for radiation therapy that they were terminal and the radiation therapy would not affect their survival. (CR 1:184-85). However, there is nothing in the record to suggest that someone from Taylor's office or at Hodges explained to the Johnsons the therapy's intent, much less his dire prognosis. (CR 1:108, 115, 133, 145). The informed consent form signed by Mr. Johnson for radiation therapy, which is reprinted in the Appendix to this Petition, does not refer to his prognosis. Mr. Johnson, with his wife, dutifully went to and received the radiation treatments over fifty-one (51) days, almost two months of the six months he had to live. (CR 1:112-23). Mr. Johnson was determined not to undergo non-curative cancer therapy, as he had seen two sisters undergo painful cancer therapy without benefit. (CR 1: 144-45). Mr. Johnson wanted no therapy unless he had a chance of survival. (CR 1:144-45). Mr. and Mrs. Johnson were "consumers" as that term is defined under the Deceptive Trade Practices Act, Texas Business & Commerce Code § 17.41 *et seq.*

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1. "Palliative care" is defined as "intervention services that focus primarily on the reduction or abatement of physical, psychosocial, and spiritual symptoms of a terminal illness." TEX. HEALTH & SAFETY CODE ANN. § 142.001(20) (Vernon 2001).

Methodist Hospital d/b/a Hodges Cancer Center, Methodist Medical Group and H. Grant Taylor, M.D. are all related. (CR 1:108; CR 2:388). Methodist Hospital d/b/a Hodges Cancer Center owns Methodist Medical Group, which employed H. Grant Taylor, M.D. (CR 1:185-86; CR 2:388). According to Taylor's employment agreement, he received an "incentive rating" for "financial production" which presumably included Methodist hospital admissi ns. (CR 2:354).

*The allegations*. Respondents' failure to disclose information known at the time of the transaction was intended to induce Mr. Johnson into a transaction into which Mr. Johnson would not have entered had the information been disclosed. This is a violation of common law fraud and the Texas Deceptive Trade Practices Act § 17.46(b)(23) or an express misrepresentation of material fact or unconscionable action or course of action that cannot be characterized as advice, judgment or opinion.

*The Summary Judgment*. Respondents filed motions for summary judgment, claiming an exemption from suit under the Deceptive Trade Practices Act on the basis of art. 4590i, § 12.01(a), which generally states that the DTPA does not apply to claims or damages for personal injury or death resulting or alleged to have resulted from *negligence* on the part of any physician or health care provider. Respondents also claimed Petitioner's causes of action were barred by Texas Revised Civil Statute art. 4590i, § 6.02, the text of which is printed above. The district court subsequently granted the motion for summary judgment.

*The Appeal*. On or about October 19, 1999, Petitioner filed a notice of her intent to appeal the order rendering a

take-nothing judgment against her. The appellate court affirmed the order of the trial court granting the motions for summary judgment in an unpublished opinion dated December 13, 2000. Petitioner filed a Motion for Rehearing on or about December 28, 2000, which was overruled by the appellate court on January 29, 2001. Petitioner filed her Petition for Review on March 15, 2001, which was denied by the Supreme Court of Texas on May 17, 2001. Petitioner filed her Motion for Rehearing on Petition for Review, which was denied by the Supreme Court of Texas on July 12, 2001. Petitioner now makes and files this her Petition for Writ of Certiorari.

*Federal Questions.* Petitioner first sought the review of federal questions in her Motion for Rehearing to the Supreme Court of Texas. As a general rule, in Texas these constitutional claims must have been asserted in the trial court in order to be raised on appeal.[2] However, in this case, the statute is not unconstitutional on its face. The Doctrine of Informed Consent, as stated in the common law and as adopted in Texas Revised Civil Statute article 4590i, does not tread on a person's right to know his prognosis in deciding whether to refuse palliative care. The trial court signed a blanket summary judgment order, and the statute only became arguably unconstitutional when the Court of Appeals adopted it as a complete defense to Johnson's DTPA and common law fraud claims.

Moreover, it has long been the rule in Texas that a Court may adjudicate a statute to be unconstitutional "when its unconstitutionality is obvious and apparent, regardless of

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2. *Wood v. Wood,* 320 S.W.2d 807, 813 (Tex. 1959).

when or how the question is raised."[3] This remains the rule even when a party fails to plead the unconstitutionality of the statute.[4] Further, appellate courts are able to consider fundamental errors, even when they are unassigned.[5] Fundamental errors are those that directly or adversely affect the interest of the public generally, as that interest is declared in the statutes or Constitution of the State.[6] Clearly, the interest of the public in making informed medical decisions is adversely affected when they are denied the right to know their prognosis.

Further, as this Court previously held in *Erie R.R. v. Purdy*,

> [i]f the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute, or authority exercised under the United States, this court could review that judgment,

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3. *Smith v. Decker*, 158 Tex. 416, 312 S.W.2d 632, 636 (1958); *Gann v. Keith*, 151 Tex. 626, 253 S.W.2d 413, 417 (1952); *Gohlman, Lester & Co. v. Whittle*, 114 Tex. 548, 273 S.W. 808, 812 (1925).

4. *Houston Chronicle Publ'g Co. v. City of Houston*, 536 S.W.2d 559, 560 (Tex. 1976).

5. *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 982-83 (Tex. 1947).

6. *See id.* at 983.

> although no Federal question was distinctly raised or insisted upon in the trial court.[7]

Accordingly, the issue is properly before the Court.

## REASONS FOR GRANTING THE WRIT

Petitioners argue that a cancer patient has a right to know that his condition is terminal, and a State's restriction of that decision under its Informed Consent Statute constitutes a violation of an individual's constitutionally protected right to refuse medical care. The Fourteenth Amendment to the Constitution of the United States provides, in part, that no person shall be deprived of "life, liberty or property, without due process of law."[8] The case at bar involves this guarantee of liberty, which has been construed by this Court to include "a right of personal privacy, or a guarantee of certain areas or zones of privacy."[9] Included in this right to personal privacy is "the interest in independence in making certain kinds of important decisions."[10] Decisions warranting this protection include those relating to marriage,[11]

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7. *Erie R.R. v. Purdy*, 185 U.S. 148, 153 (1902).

8. The Texas Constitution has a similar provision, which reads as follows: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." TEX. CONST. art. I, § 19.

9. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

10. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

11. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

contraception,[12] procreation,[13] terminating a pregnancy,[14] family life,[15] and the upbringing and education of children.[16] Petitioner contends the right to refuse medical care is included in this constitutionally protected right to privacy.

"The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."[17] It was absolutely necessary for Johnson to have adequate information of his prognosis in order to exercise his right to refuse. The Court of Appeals, in an unpublished opinion, specifically relied on 4590i, § 6.02:

> In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclosure or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could

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12. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977).

13. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

14. *Roe*, 410 U.S. at 153.

15. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

16. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

17. *Cruzan v. Director, Mo. Dep't. Health*, 497 U.S. 261, 270 (1990); *HCA, Inc. v Miller*, 36 S.W.3d 187, 191 (Tex.App.-Houston [14th Dist.] 2000).

> have influenced a reasonable person in making a decision to give or withhold consent.[18]

Of course, one's prognosis is *never* a risk and hazard of a procedure that is to be disclosed or should be.[19] Risks and hazards of a procedure as opposed to a prognosis are proverbial apples and oranges. By adopting this defense, however, the Court of Appeals dismissed the DTPA and fraud claims which were not founded on negligence. This would have been correct had the complaint been about the side effects of the radiation itself. The Court of Appeals' construction of Texas Revised Civil Statute 4590i, § 6.02 deprived Johnson of his right to refuse medical care.

Taylor was an employee of Methodist Medical Group, which was controlled by the holding company which owned Methodist and Hodges. (CR 1:185-86; CR 2:388). Taylor received a bonus under his contract with Methodist Medical Group. (CR 2:354). Thus, Taylor, Hodges and Methodist each profited at Johnson's expense. The construction of the Court of Appeals thus left Johnson, and all present and future terminal cancer patients, with no right to know their prognosis.

The Fourteenth Amendment of the United States Constitution provides no State shall "deprive any person of life, liberty or property without due process of law."[20]

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18. TEX. REV. CIV. STAT. ANN. art. 4590i § 6.02 (Vernon 2001).

19 *See* F. A. Rosovsky, Consent for Treatment: a Practical Guide, § 1.12 (2d ed. 1990).

20. U.S. CONST. amend. XIV, § 1.

The guaranties of due process, though having their roots in Magna Carta's "per legem terrae" and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation."[21] This concept is the same one adopted in abortion rights cases.[22] The Fourteenth Amendment "forbids the government to infringe certain "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[23]

Texas' interest in this situation is not the protection and preservation of human life. The medical care offered here was palliative only. The State's interest in enacting the Medical Liability and Insurance Improvement Act was, *inter alia*, to deal with the "medical malpractice insurance crisis" which has "increased the cost of medical care."[24] Johnson's claim has nothing to do with medical malpractice, with the doctor's coverage for medical malpractice or the increased cost of medical care related to that crisis. Johnson's claims would probably not even be covered under a standard

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21. *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884)).

22. *Planned Parenthood v. Casey*, 505 U.S. 833, 915 (1992) (Stevens, J., concurring and dissenting) ("In counterpoise is the woman's constitutional interest in liberty. One aspect of this liberty is a right to bodily integrity, a right to control one's person." *Id.*).

23. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

24. TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (Vernon Supp. 2001).

negligence policy. Instead, this claim is about the business of medicine, as opposed to the practice of medicine. Indeed, the State's interest is in protecting its citizens from fraudulent or unconscionable business practices of all businessmen, including doctors. Johnson's liberty interest is impaired by the statute as it was construed by the Court of Appeals. No compelling State interest exists to justify such infringement, and Johnson's liberty interest predominates over the State's interest in regulating informed consent.

Moreover, the Court of Appeals' construction violates the Open Courts Provision of the Texas Constitution.[25] This provision "does not permit a well-established common law cause of action to be restricted by statute in a way that is unreasonable and arbitrary in view of this statute's purpose."[26] Johnson's common law cause of action for fraud is a well established common law cause of action.[27] As noted above, the purposes of the Medical Liability Insurance Improvement Act were not designed to abolish fraud claims for business practices. Clearly, the Court of Appeals' construction unreasonably and arbitrarily restricts Johnson's fraud cause of action.

The judgment of the Texas Court of Appeals, Seventh District of Texas, on which the Supreme Court of Texas denied petition for review, should be reviewed by this Court because the construction of the Informed Consent Statute

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25. TEX. CONST. art. I, § 13.

26. *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex. 1997).

27. *Jackson v. Julian*, 694 S.W.2d 434 (Tex. App.–Dallas 1985, no writ).

deprives Johnson of his United States and Texas constitutional right to refuse medical treatment and is in violation of the Open Courts Provision of the Texas Constitution restricting his common law cause of action for fraud.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the event that the petition is granted, Petitioner prays that the judgment of the court below be reversed, and that the cause be remanded.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS OF TEXAS, AMARILLO DATED DECEMBER 13, 2000**

COURT OF APPEALS OF TEXAS
AMARILLO

No. 07-99-0439-CV

MARY JOHNSON, Individually and as Representative of the Estate of Billy D. Johnson, Deceased,

Appellant,

v.

H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL PRACTICE MANAGEMENT SERVICES, INC., d/b/a METHODIST MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC, and METHODIST HOSPITAL, LUBBOCK, TEXAS d/b/a HODGES CANCER CENTER,

Appellees.

Dec. 13, 2000.

From the 72nd District Court of Lubbock County; No. 98-501,407-A; J. Blair Cherry, Presiding.

Before BOYD, C.J., and QUINN and REAVIS, JJ.

*Appendix A*

QUINN.

Mary Johnson, individually and as the representative of the Estate of Billy D. Johnson, Deceased, appeals from a final summary judgment. Through her sole point of error, she contends that the trial court erred in entering such judgment in favor of H. Grant Taylor, M.D. (Taylor), Lubbock Methodist Hospital Practice Management Services, Inc., d/b/a Methodist Medical Group d/b/a Lubbock Diagnostic Clinic (Clinic), and Methodist Hospital Lubbock, Texas d/b/a Hodges Cancer Center (Hodges). We affirm.

Background

Johnson sued Taylor, Clinic and Hodges after her husband died of cancer. The only causes of action alleged sounded in common law fraud and deceptive trade practice and arose from the purported failure of the defendants to notify the decedent and his family that the patient's prognosis was poor and that the treatment was "palliative" only. Had the decedent known this information, he allegedly would not have undergone treatment.

Standard of Review

The standard of review applicable to summary judgments is well-known and need not be discussed. It is sufficient to cite the litigants to *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910 (Tex.1997) and *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex.1985) for an explanation of same.

*Appendix A*

Motion for Summary Judgment — Hodges

Hodges moved for summary judgment on two grounds. The first involved the existence of a duty to inform the decedent as to his prognosis and treatment. According to Hodges, it had no such duty. The second concerned whether the deceptive trade practice claim was barred by article 4590i, section 12.01, of the Texas Revised Civil Statutes. The latter states that:

> Notwithstanding any other law, no provision of Sections 17.41-17.63, Business & Commerce Code, shall apply to physicians or health care providers . . . with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.

In granting the motion, the trial court did not state upon which ground it acted. Thus, if either is viable we must affirm.

*Existence of Duty to Inform*

Authority holds that a physician has the duty to inform the patient of the risks and benefits of a medical procedure. *Boney v. Mother Frances Hosp.*, 880 S.W.2d 140, 143 (Tex.App. – Tyler 1994, writ denied); *Gibson v. Methodist Hosp.*, 822 S.W.2d 95, 101 (Tex.App. – Houston [1st Dist.] 1991, writ denied). Yet, no comparable duty rests with the hospital. *Id.* Since 1) the alleged failure to inform the decedent of both his prognosis and the limited benefits of the procedure in question form the basis of Johnson's two

causes of action and 2) Hodges had no duty to provide that information as per *Boney* and *Gibson,* we conclude that the trial court correctly granted summary judgment. Simply put, without a duty to inform, Hodges could not have committed fraud or a deceptive trade practice by failing to inform.[1]

*Motion for Summary Judgment — Taylor and Clinic*

In their motion for summary judgment, Taylor and the Clinic also relied upon article 4590i, section 12.01 of the Texas Revised Civil Statutes. Added to this ground were contentions founded upon 1) the application of section 6.02 of the same article, 2) the lack of standing, and 3) the absence of causation. We need only address the application of section 6.02, however, for it is dispositive.

Section 6.02 provides that:

> In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered . . ., the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

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1. In so concluding, we need not address the validity of the other ground on which the summary judgment for Hodges could have been founded.

Tex.Rev.Civ.Stat.Ann. art. 4590i, § 6.02 (Vernon's Supp. 2000). In applying this statute to the circumstances at bar, we note that Johnson decried the purported failure of Taylor and the Clinic to disclose information to her and her husband. The information in question pertained to her husband's condition and the potential ameliorative effects, if any, of the radiation treatment. According to Johnson, Taylor knew the therapeutic effects of the treatment would be minimal given the type of cancer involved and, had he revealed that information, her husband purportedly would have foregone treatment.

As can be seen, the allegation upon which Johnson founded her suit involves nothing more than the purported failure to disclosure information about a risk which would have reasonably influenced a patient's decision to undergo treatment. The risk in question entailed the probable *de minimis* effect of the treatment on the cancer. That being the basis of her chose-in-action, the latter falls within the confines of section 6.02. As such, it could only be pursued through a claim of negligence, not through one sounding in fraud and deceptive trade practice. Tex.Rev.Civ.Stat.Ann. art. 4590i, § 6.02; *Marks Brown v. Rogg,* 928 S.W.2d 304, 306 (Tex.App. – Houston [14th dist.] 1996, writ denied).[2] And, since Johnson did not alleged a negligence cause, the trial court did not err in granting summary judgment.

Accordingly, we affirm the summary judgment.

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2. As in *Marks Brown,* we are not saying that section 6.02 would bar every claim asserting fraud or deceptive trade practice. It will, however, when the claim encompasses the failure to inform the patient about the risks and hazards of medical treatment. *Marks Brown v. Rogg,* 928 S.W.2d 304, 306 (Tex.App. – Houston [14th dist.] 1996, writ denied).

**APPENDIX B — JUDGMENT NUNC PRO TUNC AND ORDER OF SEVERANCE OF THE 72ND DISTRICT COURT OF LUBBOCK COUNTY, TEXAS DATED JULY 21, 1999 AND FILED JULY 22, 1999**

IN THE 72ND DISTRICT COURT OF
LUBBOCK COUNTY, TEXAS

NO. 98-501,407

MARY JOHNSON, Individually And as Representative of the Estate of Billy D. Johnson, Deceased

v.

H. GRANT TAYLOR, M.D., JOHN P. LYTLE, JR., M.D., ONCOLOGY HEMATOLOGY ASSOCIATES, LUBBOCK METHODIST HOSPITAL PRACTICE MANAGEMENT SERVICES, INC. d/b/a METHODIST MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC and METHODIST HOSPITAL, LUBBOCK, TEXAS d/b/a HODGES CANCER CENTER

**JUDGMENT NUNC PRO TUNC AND ORDER OF SEVERANCE**

This Judgment Nunc Pro Tunc and Order of Severance is issued instead and in place of the Judgment previously signed herein on July 9, 1999.

On March 26, 1999, came on before the Court for submission the Motion for Summary Judgment and First Supplement to Motion for Summary Judgment of Defendant Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer

Center, the Motion for Summary Judgment of Defendant H. Grant Taylor, M.D., and the Motion for Summary Judgment of Defendant Lubbock Methodist Hospital Practice Management Services, Inc. d/b/a Methodist Medical Group d/b/a Lubbock Diagnostic Clinic, and it appearing to the Court that due notice of the submission of such motions has been given:

And the Court, having considered the pleadings, summary judgment evidence, and authorities and argument of counsel, is of the opinion that there is no genuine issue as to any material fact with respect to the asserted claims of Plaintiff against the above named Defendants who have filed a Motion for Summary Judgment herein, and that each of such Defendants is entitled to a take-nothing judgment as a matter of law:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Motions for Summary Judgment of the above named Defendants be, and the same are hereby granted and sustained, and it is ordered by the Court that Plaintiff take nothing against the Defendants Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer Center; H. Grant Taylor, M.D.; and Lubbock Methodist Hospital Practice Management Services, Inc. d/b/a Methodist Medical Group d/b/a Lubbock Diagnostic Clinic, and that such Defendants recover their costs herein, for which execution may issue.

It is further ordered that the alleged claims and causes of action against the above named Defendants be severed from the claims of Plaintiff against the remaining Defendant

*Appendix B*

Oncology Hematology Associates, and that this severed cause of action styled *Mary Johnson, Individually and as Representative of the Estate of Billy D. Johnson, Deceased v. H. Grant Taylor, M.D., Lubbock Methodist Hospital Practice Management Services, Inc. d/b/a Methodist Medical Group d/b/a Lubbock Diagnostic Clinic and Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer Center* be assigned Cause No. 98-501,407-A on the docket of this Court.

Signed this 21 day of July, 1999.

[stamp] /s/ J. Blair Cherry, Jr., Judge
JUDGE PRESIDING

## APPENDIX C — LETTER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REVIEW DATED MAY 17, 2001

**THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin Texas 78711
(512) 463-1312

May 17, 2001

Mr. Tom H. Whiteside
Nelson & Nelson
1001 Main Street, Suite 601
Lubbock, TX 79401

Mr. Cecil Kuhne
Crenshaw Dupree & Milam
P. O. Box 1499
Lubbock, TX 79408-1499

Mr. Robert Andrew Aycock
McClesky, Harriger, Brazill & Graf
P. O. Box 6170
Lubbock, TX 79493

RE: Case Number 01-0221
Court of Appeals Number: 07-99-00439-CV
Trial Court Number: 98-501,407

Style: MARY JOHNSON, individually and as representative of THE ESTATE OF BILLY D. JOHNSON, deceased
v.
H. GRANT TAYLOR, M.D., METHODIST MEDICAL GROUP, and HODGES CANCER CENTER

*Appendix C*

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams

by s/ Gena Pelham
Gena Pelham, Deputy Clerk

cc: Ms. Peggy Culp, Clerk
Ms. Jean Anne Stratton

**APPENDIX D — LETTER OF THE SUPREME COURT OF TEXAS DENYING MOTION FOR REHEARING DATED JULY 12, 2001**

**THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin Texas 78711
(512) 463-1312

July 12, 2001

Mr. Tom H. Whiteside
Nelson & Nelson
1001 Main Street, Suite 601
Lubbock, TX 79401

Mr. Cecil Kuhne
Crenshaw Dupree & Milam
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Lubbock, TX 79408-1499

Mr. Robert Andrew Aycock
McClesky, Harriger, Brazill & Graf
P. O. Box 6170
Lubbock, TX 79493

RE: Case Number 01-0221
Court of Appeals Number: 07-99-00439-CV
Trial Court Number: 98-501,407

Style: MARY JOHNSON, individually and as representative of THE ESTATE OF BILLY D. JOHNSON, deceased
v.
H. GRANT TAYLOR, M.D., METHODIST MEDICAL GROUP, and HODGES CANCER CENTER

*Appendix D*

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above styled petition for review.

Sincerely,

John T. Adams

by s/ Gena Pelham
Gena Pelham, Deputy Clerk

cc: Ms. Peggy Culp, Clerk
Ms. Jean Anne Stratton

## APPENDIX E — RADIATION THERAPY DISCLOSURE AND CONSENT BY BILLY DEWAYNE JOHNSON FOR METHODIST HOSPITAL, LUBBOCK, TEXAS DATED MARCH 11, 1996

METHODIST HOSPITAL
Lubbock, Texas

### RADIATION THERAPY DISCLOSURE AND CONSENT

JOHNSON, BILLY DEWAYNE

As a patient, you have the right to be informed about your condition and the recommended radiation therapy procedure to be used to treat your condition. This disclosure is not meant to alarm you; however, there are certain risks which are associated with radiation therapy. This explanation is intended to inform you of those risks so that you may give or withhold your consent to the recommended procedure on an informed basis. Please carefully review the following and if you choose to proceed with this treatment, sign this consent in the space below:

I hereby voluntarily request and authorize Dr. LYTLE as my physician, and such associates, technicians and the health care providers as they may deem necessary to treat my condition which has been explained to me as:

CANCER

I understand that my condition may be treated with external beam radiation therapy alone, with internal radiation implant alone or with both or in planned combination with surgery and/or chemotherapy.

*Appendix E*

I understand that the following radiation therapy procedure(s) are planned for me and I consent to and authorize these procedure(s).

EXTERNAL BEAM RADIATION

I further authorize the taking of photographs or placing of tattoo or skin marks necessary for treatment.

* * *

I understand that there may be side-effects or complications from radiation therapy, either during or shortly after the course of treatment ("early reactions"), or some time later ("late reactions"). Any of the side-effects or complications may be temporary or permanent.

These reactions may be worsened by chemotherapy or surgery before, during or after radiation therapy or by previous radiation therapy to the same area.

Early and late reactions which could occur as a result of the procedure(s) are listed below. With few exceptions, these reactions affect only the areas actually receiving radiation therapy.

See attachment #3 pertaining to THORAX

The nature and purpose of the proposed procedure, the alternative methods of treatment, and the risks and hazards if treatment is withheld have been explained to me by my physician. I have had an opportunity to discuss these matters

with my physician and to ask questions about my condition, alternative methods of treatment and the proposed procedure(s). I understand that no warranty or guarantee has been made to me as to result or cure.

s/ Billy D. Johnson
PATIENT/OTHER LEGALLY RESPONSIBLE PERSON (SIGNATURE)

Date: 3-11-96 Time: 3:30 P.M.

s/ [illegible]
WITNESS

Supreme Court, U.S.
FILED
NOV 6 2001
CLERK

No. 01-626

In The

# Supreme Court of the United States

MARY JOHNSON, Individually and as Representative of the Estate of Billy D. Johnson, Deceased,

*Petitioner,*

v.

H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL PRACTICE MANAGEMENT SERVICES, INC., d/b/a METHODIST MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC, and METHODIST HOSPITAL, LUBBOCK, TEXAS d/b/a HODGES CANCER CENTER,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Texas Court Of Appeals, Seventh District**

## RESPONDENT METHODIST HOSPITAL, LUBBOCK, TEXAS, d/b/a HODGES CANCER CENTER'S BRIEF IN OPPOSITION

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED FOR REVIEW

1. Since this Federal constitutional contention was first raised by Petitioner in Petitioner's Motion for Rehearing in the Texas Supreme Court and the Judgments of the trial court and of the Texas Court of Appeals with respect to Respondent Methodist Hospital are primarily based upon state common-law which adequately, independently and correctly supports the Judgment of the trial court, is any alleged Federal constitutional contention urged by Petitioner before this Court for review?

2. Did the State trial court correctly render a take-nothing judgment in favor of Defendant/Respondent Methodist Hospital on the ground that Methodist Hospital (a hospital which is not licensed to practice medicine) had no duty (or even a right) to discuss with the deceased patient and his family the patient's prognosis and risks, possible benefits, and other considerations involved in patient's proposed treatment, as a matter of law?

3. Did the State trial court correctly render judgment in favor of Defendant/Respondent Methodist Hospital on the additional ground that Plaintiff/Petitioner's claims in this case are governed and barred by the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, section 12.01(a) and section 6.02, as a matter of law?

4. Is there any merit to Petitioner's vague and ambiguous contentions as to the unconstitutionality of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, assuming, *arguendo*, that such contentions are properly before this Court for consideration?

## LIST OF PARTIES

The caption of this case includes the names of all parties.

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent Methodist Hospital, Lubbock, Texas, d/b/a Hodges Cancer Center, respectfully requests that the Court deny the Petition for a Writ of Certiorari.

This case does not involve any Federal constitutional question which was properly raised and decided by the Texas Supreme Court. The trial court correctly rendered a take-nothing judgment for this Respondent on the basis of its Motion for Summary Judgment, which was correctly affirmed on appeal by the Texas Court of Appeals for the Seventh District of Texas. Petitioner's Petition for Review (which is completely discretionary) was properly denied by the Texas Supreme Court.

## STATEMENT OF THE CASE

This is a suit for common-law fraud and an alleged claim under the Texas Deceptive Trade Practices Act ("DTPA") for alleged misrepresentation and failure to disclose information by Petitioner, Mary Johnson, Individually and as Representative of the Estate of Billy D. Johnson, Deceased (Plaintiff in the trial court). (1 CR 3-6).

The primary defendants in this case are Respondent, H. Grant Taylor, M.D., the treating physician of the deceased patient, and Respondent Methodist Hospital, Lubbock, Texas, d/b/a Hodges Cancer Center, which entity administered the treatment to the deceased patient prescribed by the deceased patient's treating physician, Dr. Taylor.

The parties will be referred to hereinafter primarily by their designation in the trial court.

The trial court rendered a take-nothing judgment based on the Motions for Summary Judgment filed by both Defendants.

It is undisputed and conceded by Petitioner in her brief that Plaintiff did not assert any Federal question or constitutional contention until Plaintiff's Motion for Rehearing in the Texas Supreme Court. On page 6 of the Petition for a Writ of Certiorari, it is stated: "Petitioner first sought the review of federal questions in her Motion for Rehearing to the Supreme Court of Texas."

Plaintiff alleged in her Petition in the trial court that Defendants failed to advise the Decedent and his family that his prognosis was poor; that the proposed radiation treatment was "palliative" only; and if Decedent had been advised of these facts, he allegedly would not have undergone radiation treatment.

The Appendix to the Petition for a Writ of Certiorari contains a copy of the Judgment of the trial court, a copy of the Opinion of the Amarillo Court of Appeals and copies of letters from the Texas Supreme Court advising of the court's denial of the Petition for Review and Motion for Rehearing.

The Appendix to the Petition for a Writ of Certiorari does not contain a copy of Petitioner's Motion for Rehearing in the Texas Supreme Court which would reflect specifically what Federal constitutional question was allegedly asserted by Petitioner in her Motion for Rehearing in the Texas Supreme Court.

Respondent Methodist Hospital's Motion for Summary Judgment and supplement thereto in the trial court was based upon two grounds, which are in essence (1) Defendant Methodist Hospital had no duty or right to discuss with the deceased patient and his family his prognosis and the risks, benefits or other considerations involved and his proposed treatment, as a matter of law; and (2) Plaintiff's claims are governed and barred by the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 12.01(a), as a matter of law. (1 CR 25, 150).

The other defendants (with the exception of Oncology Hematology Associates) also filed Motions for Summary Judgment. (1 CR 72).

The trial court rendered judgment in favor of all defendants who filed Motions for Summary Judgment and entered an order severing Plaintiff's claims against them from Plaintiff's claims against the remaining defendant, Oncology Hematology Associates. (2 CR 517, 522).

The Court of Appeals for the Seventh District of Texas sitting in Amarillo affirmed the trial court's Judgment. (App. A to the Petition for a Writ of Certiorari in which the Court of Appeals for the Seventh District of Texas is erroneously referred to as the United States Court of Appeals of Texas, Amarillo.)

Petitioner sought review of the Decision of the Amarillo Court of Appeals in the Texas Supreme Court, which denied the Petition for Review and subsequently

the Motion for Rehearing (Pet. App. C and App. D), without opinion.

## SUMMARY OF ARGUMENT

**1. This case and the alleged Federal constitutional contention urged by Petitioner is not before this Court for review.**

Petitioner asserts jurisdiction in this Court under 28 U.S.C.A. § 1257 which provides that a final judgment rendered by the highest court of a state may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a statute of a state is drawn into question on the ground of its being repugnant to the Constitution of the United States.

The record reflects there is no basis for certiorari jurisdiction in this case.

As stated above, this is a suit by Plaintiff against Defendant physician (Dr. Taylor), Defendant Hospital (Methodist Hospital), and others under the theory of common-law fraud and alleged violation of the Texas Deceptive Trade Practices Act.

The trial court rendered judgment for Defendants based on their Motions for Summary Judgment. The Court of Appeals for the Seventh District of Texas at Amarillo affirmed such judgment and subsequently, the Texas Supreme Court refused Plaintiff's Petition for Review (discretionary) and Motion for Rehearing without opinion.

Plaintiff asserted no Federal constitutional contention in the trial court, court of appeals or in her Petition for Review in the Texas Supreme Court. Plaintiff first asserted her constitutional contention in her Motion for Rehearing in the Texas Supreme Court, which was denied without opinion.

Plaintiff's constitutional contention was not timely raised in the State courts, nor was it specifically passed on or decided by the State's highest court (the Texas Supreme Court).

It is also well settled that this Court will not review a state court's decision which is based on independent and adequate state grounds.

The trial court's judgment as to Defendant Methodist and affirmance of that judgment by the court of appeals is supported by the common-law ground (aside from any issue as to the validity or applicability of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i), that Defendant/Respondent Methodist Hospital had no duty or right to advise the deceased patient of his prognosis and the risks or benefits and other considerations involved in his proposed treatment.

Therefore, it is clear that there is no Federal constitutional contention or issue before this Court for review with respect to Defendant/Respondent Methodist Hospital.

**2. Defendant Methodist Hospital had no duty or right to discuss with the deceased patient and his family his prognosis and the risks, benefits and other considerations involved and proposed treatment, as a matter of law.**

It is fundamental that a plaintiff must establish a duty owed by a defendant to the plaintiff upon which the plaintiff's claims are based and that the issue as to whether or not such a duty is owed by the defendant to the plaintiff is a question of law for the court to determine under the facts and circumstances.

A hospital cannot engage in the practice of medicine and a license to practice medicine may be issued only to a natural person.

It is not the function or duty of a hospital to advise a patient of his prognosis or discuss with a patient the risk and benefits of a proposed procedure and this is a non-delegable duty which lies solely with the physician. Defendant Methodist Hospital owed no duty (or right) to advise the deceased patient of his prognosis and that the intent of the proposed radiation treatment was "palliative" only. Therefore, there is no basis for Plaintiff's alleged fraud and DTPA claim against Defendant Methodist, as a matter of law.

**3. Plaintiff's claims are governed and barred by the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 6.02 and § 12.01(a), which is not unconstitutional.**

Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 12.01(a) provides that the provisions of the DTPA

(§§ 17.41-17.63 of the Texas Business and Commerce Code) do not apply to either physicians or health care providers with respect to claims for damages for personal injury or death resulting or alleged to have resulted from the negligence on the part of a physician or health care provider.

Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 6.02 provides that in a suit against a physician or health care provider involving a claim based upon the alleged failure to disclose or adequately disclose the risks and hazards involved in the medical care rendered by the physician or health care provider the only theory upon which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

In this case, Plaintiff's DTPA claims specifically involve the alleged failure of Defendants to adequately disclose to the Deceased and his family the nature of Deceased's illness and the purpose of the proposed radiation treatment. Plaintiff's claim is clearly a negligence claim under § 6.02 and, therefore, there is no basis for Plaintiff's claim against Defendant Methodist Hospital as a health care provider under the DTPA by virtue of the express provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 12.01(a).

Respondent submits that the provisions of art. 4590i in issue here are clearly constitutional.

Section 6.02 and section 12.01(a) of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, do nothing

more than eliminate medical malpractice claims based upon negligence from the purview of the Texas DTPA.

Vernon's Texas Revised Civil Statutes Annotated, art. 4590i in no way deprives or even affects a patient's right to refuse medical treatment and in no way restricts a plaintiff's common-law cause of action for fraud (in cases where there is a basis for a common-law cause of action for fraud) in violation of Fourteenth Amendment to the United States Constitution.

## ARGUMENT

**1. This case and the alleged Federal constitutional contention urged by Petitioner are not before this Court for review.**

28 U.S.C. § 1257 providing a basis for certiorari review by this Court of a state court decision provides that final judgments rendered by the highest court of a state may be reviewed by the Supreme Court by certiorari where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution of the United States.

The law governing presentation of the alleged Federal constitutional issue in the state courts is well-summarized in 36 C.J.S. Federal Courts § 274(2). It is there stated (pp. 749-50):

> *Presenting question in trial court.* The reviewing power of the Supreme Court of the United States is confined to the judgments and decrees of the highest state court in which a decision could be had, see supra § 239, and in the great

> majority of cases the decision which was brought up for review is one rendered on appeal from, or writ of error to, a lower court of the state. *Consequently, as it is a rule of almost universal application that questions not raised in the trial court will not be considered on appeal, one who desires to save his right of review by the United States Supreme Court must raise the federal question on which he relies in the trial court. One who, on appeal or writ of error to a state court, raises a federal question not set up in the trial court, cannot ask a review by the Supreme Court of the United States in case the state appellate court declines or omits to consider such question.* (Footnote omitted.) (Emphasis added.)

(p. 750):

> *Question raised on petition for rehearing. It is not sufficient to raise the federal question for the first time in a petition for rehearing after judgment has been rendered by the state court, unless the court entertains the motion and decides the question or unless the first opportunity to present the question was on the motion for the rehearing.* In other words, questions first presented to the highest state court on a petition for rehearing come too late for consideration by the United States Supreme Court on certiorari unless the state court exerted its jurisdiction in such a way that the case could have been taken to the United States Supreme Court if the questions had been raised prior to the original disposition. (Footnotes omitted.) (Emphasis added.)

In *Clark v. Jeter*, 486 U.S. 456, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988), this Court said:

> Having reviewed the record, however, we find that Clark did not adequately present a federal pre-emption argument to the lower courts. It is our practice, when reviewing decisions by state courts, not to decide federal claims that were not "pressed or passed upon" below. Bankers Life & Casualty Co. v. Crenshaw, 486 US 71, 79-80, 100 L Ed 2d 62, 108 S Ct 1656 (1988).

486 U.S. at 459-60.

In *Adams v. Robertson*, 520 U.S. 83, 137 L. Ed. 2d 203, 117 S. Ct. 1028 (1997), this Court said:

> With "very rare exceptions," *Yee* v *Escondido*, 503 US 519, 533, 118 L Ed 2d 153, 112 S Ct 1522 (1992), we have adhered to the rule in reviewing state-court judgments under 28 USC § 1257 [28 USCS § 1257] that we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review. See *Heath* v *Alabama*, 474 US 82, 87, 88 L Ed 2d 387, 106 S Ct 433 (1985); *Illinois* v *Gates*, 462 US 213, 217-219, 76 L Ed 2d 527, 103 S Ct 2317 (1873); *McGoldrick* v *Compagnie Generale Transatlantique*, 309 US 430, 4343, 84 L Ed 849, 60 S Ct 670 (1940). As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari. See Reply Brief for Petitioners 2-3, n. 1.
>
> **[1b, 2]** Nor have petitioners met their burden of showing that the issue was properly presented to the court. *When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented. Board of Directors of Rotary Int'l* v *Rotary Club of Duarte*, 481 US

> 537, 550, 95 L Ed 2d 474, 107 S Ct 1940 (1987), * * * . (Emphasis added.)

520 U.S. at 86-87.

In *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987), this Court said:

> It is well settled that this Court will not review a final judgment of a state court unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v Webb, 451 US 493, 496-497, 68 L Ed 2d 392, 101 S Ct 1889 (1981). *Appellants did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal. The court denied the petition without opinion. When " ' "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." ' "* Exxon Corp. v Eagerton, 462 US 176, 181, n 3, 76 L Ed 2d 497, 103 S Ct 2296 (1983) (quoting Fuller v Oregon, 417 US 40, 50, n 11, 40 L Ed 2d 642, 94 S Ct 2116 (1974) (quoting Street v New York, 394 US 576, 582, 22 L Ed 2d 572, 89 S Ct 1354 (1969))), Appellants have made no such showing in this case. (Emphasis added.)

481 U.S. at 550.

In the case at bar, Petitioner did not raise a purported Federal or constitutional question until filing her Motion for Rehearing in the Texas Supreme Court after the denial by the Texas Supreme Court of the Petition for Review from the decision of the Amarillo Court of Appeals.

The issue was not properly presented to or expressly decided by the State courts.

Furthermore, it is well settled that when a state court decision is based upon state law that is both adequate and independent (of any Federal issue), this Court will not review that decision.

In *Mullaney v. Wilbur*, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1861 (1975), this Court said:

> "This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, see, e.g., Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875); Winters v New York, 333 US 507, 92 L Ed 840, 68 S Ct 665 (1948), and that we are bound by their constructions except in extreme circumstances not present here." (Footnote omitted.) 421 U.S. at 691.

*See also Coleman v. Thompson*, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991), *reh'g denied*, 501 U.S. 1227 (1997); *Calderon v. U.S. Dist. Ct. for E. D. Cal.*, 96 F.3d 1126, 1129 (9th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Schad v. Arizona*, 501 U.S. 624, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991), *reh'g denied*, 501 U.S. 1277 (1991).

In *Illinois v. Rodriguez*, 497 U.S. 177, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (1990), this Court said: "When a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision. Michigan v Long, 463 US 1032, 1041, 77 L Ed 2d 1201, 103 S Ct 3469 (1983)." 497 U.S. at 182.

In *Lambrix v. Singletary*, 520 U.S. 518, 137 L. Ed. 2d 771, 117 S. Ct. 1517 (1997), this Court said:

> In *Coleman* v *Thompson*, 501 US 722, 729, 115 L Ed 2d 640, 111 S Ct 2546 (1991), we reaffirmed that this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." See also *Harris* v. *Reed*, 489 US 255, 262, 103 L Ed 2d 308, 109 S Ct 1038 (1989). We in fact lack jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory. *Herb* v *Pitcairn*, 324 US 117, 125-126, 89 L Ed 789, 65 S Ct 459 (1945); see also *Sochor* v. *Florida*, 504 US 527, 533-534, and n., 119 L Ed 2d 326, 112 S Ct 2114 (1992).

520 U.S. at 522-3.

In the case at bar, the decision of the trial court and the decision of the court of appeals with respect to Defendant Methodist Hospital were based first and foremost upon State law, which is clearly adequate and independent of the Texas statutory provision which Petitioner here asserts is unconstitutional.

**2. Defendant Methodist Hospital had no duty (or right) to discuss with the Deceased and his family the Deceased's prognosis and the risks, benefits, and other considerations involved in proposed treatment, as a matter of law.**

It is fundamental that under any alleged cause of action or theory of recovery, a plaintiff must establish a duty owed by a defendant to the plaintiff upon which the

plaintiff's claims are based and that the issue as to whether or not such a duty is owed by the defendant to the plaintiff is a question of law for the court to determine under the particular facts of the case. *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (2) (Tex. 1996); *Bird v. W.C.W.*, 868 S.W.2d 767 (2) (Tex. 1994); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 823 (4) (Tex. 1990).

In this case, it is undisputed that Defendant Methodist Hospital owed no duty to discuss with the Deceased, Billy Dewayne Johnson, or the Deceased's family, his prognosis and the risks, benefits, or other considerations involved in radiation therapy or other treatment options and, in fact, could not have legally done so.

In addition to the cases discussed below, the first ground of Methodist Hospital's Motion for Summary Judgment (that it had no duty (or right) to discuss with the patient and his family his prognosis and the risks, benefits or other considerations involved in the proposed treatment) is supported by the deposition testimony of Dr. Lytle, one of the originally named defendants to this suit.

Subsequent to the filing of the suit, Plaintiff filed a Notice of Nonsuit with respect to Dr. Lytle. (1 CR 15).

Methodist Hospital's Motion for Summary Judgment and first supplement thereto are based in part upon relevant portions of the deposition testimony of Dr. Lytle, Dr. Grant Taylor, Dana Rains, and Kathy Lambright, which are attached as exhibits to Methodist Hospital's Motion and First Supplement to Motion for Summary Judgment.

Dr. Lytle testified that he was board certified in radiation oncology. (1 CR 37).

Dr. Lytle testified that the Deceased was referred to him by Dr. Taylor for radiation therapy.

Dr. Lytle testified that he had a contract with Hodges Cancer Center to provide medical services to their patients. He was not an employee of Methodist Hospital but was an independent contractor physician. He billed his patients directly for his services which charges were not shared with Methodist Hospital. (1 CR 55-56).

He testified that when he receives referrals from other physicians such as Dr. Taylor, he makes an independent judgment and determination as to whether radiation therapy should be recommended to the patient. (1 CR 38-39).

Dr. Lytle testified that he was of the opinion that radiation therapy would be beneficial to the Deceased and should be undertaken for the reasons discussed in the deposition. (1 CR 39-40).

Dr. Lytle testified that he did discuss Mr. Johnson's prognosis with him and his family. (1 CR 42).

Dr. Lytle testified that the decision as to whether or not to undertake the radiation treatment was a decision made by himself and the patient. (1 CR 54, 59).

Dr. Lytle further testified that although he had no independent recollection of his specific discussions and explanations of proposed treatment with the Deceased in this case, this was his customary practice, and the records including the signed consent of the Deceased indicates

that he did discuss these matters with the Deceased. (1 CR 45-46, 60).

Dr. Lytle further testified unequivocally that it is not the role of the staff at Hodges Cancer Center to discuss with a patient their prognosis, and the role of the staff at Hodges Cancer Center is to carry out the orders which he gives them in connection with treatment.

In this connection, Dr. Lytle testified specifically as follows:

"Q All right, sir. Would you expect the role of the staff there at the Hodges cancer center to discuss with a patient their prognosis?

"A No.

"Q What is the role of the staff there?

"A The role of the staff is primarily to carry out the orders that I give them.

* * *

"Q Is it the role of the staff at the Hodges Cancer Center to carry out your orders, doctor?

"A Yes." (1 CR 61).

Dr. Taylor testified in this regard as follows:

"Q Okay. And did you – when you referred a patient over to Methodist Hodges Cancer Center for radiation therapy, did you expect Dr. Lytle or any of the staff over there to go into any detail about the patient's prognosis?

"A Generally not. Generally we figured as the medical people involved, especially with

> metastatic disease, that we were the ones who knew best about that; no." (1 CR 187).

Dana Rains was the administrative director of Hodges Cancer Center during the time that the Deceased, Billy Johnson, was treated at Hodges (1 CR 192-193) and Kathy Lambright was an L.V.N. who worked in radiation at Hodges during the period in time, including the period of Mr. Johnson's treatment. (1 CR 206-207).

Dana Rains testified that the staff personnel at Hodges were not licensed to practice medicine and both Ms. Rains and Ms. Lambright testified that the staff at Hodges Cancer Center did not discuss with the patients their prognosis, the various treatment options available, the purpose of the treatment prescribed or any other considerations involved in the treatment and their function was simply to administer or assist in administering the treatment prescribed by the physician.

Both Ms. Rains and Ms. Lambright confirmed that any consultation with regard to diagnosis and other considerations involved in the treatment options and treatment being administered is between the physician and the patient and his family and the staff is not privy to those discussions between the physician and the patient and the patient's family. (1 CR 195, 197, 200, 210, 211).

Defendant Methodist Hospital, d/b/a Hodges Cancer Center is not licensed to practice medicine under Vernon's Texas Revised Civil Statutes Annotated, art. 4495b, the Texas Medical Practice Act, and does not purport to practice medicine.

It is well settled that a corporation cannot engage in the practice of medicine. A license to practice medicine

may be issued only to a natural person. *Woodson v. Scott & White Hospital*, 186 S.W.2d 720, 724-725 (3, 4) (Tex. Civ. App. – Austin 1945, writ ref'd w.m.); *Williams v. Good Health Plus, Inc.*, 743 S.W.2d 373 (1) (Tex. App. – San Antonio 1987, no writ); *Flynn Bros., Inc. v. First Medical Associates*, 715 S.W.2d 782, 785 (Tex. App. – Dallas 1986, writ ref'd n.r.e.).

The practice of medicine by one who is not registered and licensed to practice medicine is prohibited by law. *Kirk v. Standard Life and Accident Ins. Co.*, 475 S.W.2d 570, 573(3) (Tex. 1972).

Diagnosis of medical conditions constitutes the practice of medicine and is authorized only by a licensed physician. *Webber v. State*, 370 S.W.2d 889(1) (Tex. Crim. App. 1963); *Kelley v. Texas State Board of Medical Examiners*, 467 S.W.2d 539(4) (Tex. Civ. App. – Fort Worth 1971, writ ref'd n.r.e.), *cert. denied*, 405 U.S. 1073, *reh'g denied*, 407 U.S. 916 (1972).

In this connection, there are numerous cases holding that it is the function and duty of the physician to discuss with the patient his prognosis and the factors involving the possible benefits, risks, and other consideration in the connection with the proposed treatment and treatment options in order for the patient to make an informed judgment. This is a non-delegable duty and the duty to discuss these options and obtain the patient's informed consent rests solely with the treating physician. Numerous cases hold that the physician is under a duty to make reasonable disclosure of the diagnosis and the risks of proposed treatment with the patient. *Wilson v. Scott*, 412 S.W.2d 299, 301 (Tex. 1967); *Anderson v. Hooker*,

420 S.W.2d 235, 237-238 (Tex. Civ. App. – El Paso 1967, writ ref'd n.r.e.); *Karp v. Cooley*, 493 F.2d 408, 419 (5th Cir. 1974) appeal from Southern District of Texas, *rehearing den'd*, 496 F.2d 878 (5th Cir. 1974), *cert. den'd*, 419 U.S. 485 (1975).

*See also Jacobs v. Thimer*, 519 S.W.2d 846, 848(3) (Tex. 1975); *Powers v. Floyd*, 904 S.W.2d 713, 717(6) (Tex. App. – Waco 1995, writ den'd), *cert. den'd*, 516 U.S. 1126 (1996); *Galvan v. Downey*, 933 S.W.2d 316, 318(2) (Tex. App. – Houston [14th Dist.] 1996, writ den'd); *Winkle v. Tullos*, 917 S.W.2d 304(22) (Tex. App. – Houston [14th Dist.] 1995, writ den'd); *Johnston v. Vilardi*, 817 S.W.2d 794, 796(3) (Tex. App. – Houston [1st Dist.] 1991, writ den'd); *Johnson v. Whitehurst*, 652 S.W.2d 441, 444(2) (Tex. App. – Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Winkle v. Tullos*, 917 S.W.2d 304, 313(22) (Tex. App. – Houston [14th Dist.] 1995, writ den'd); *Hood v. Phillips*, 357 S.W.2d 291, 294(4) (Tex. Civ. App. – Beaumont 1976), *aff'd*, 554 S.W.2d 160 (Tex. 1977).

In this regard, there are a number of cases specifically holding that it is not the function or duty of the hospital to discuss with the patient his diagnosis and the risks and benefits of the proposed procedure and such duty lies with the physician.

In *Gibson v. Methodist Hosp.*, 822 S.W.2d 95 (16) (Tex. App. – Houston [1st Dist.] 1991, rev'd, op. withdrawn, den'd), the court said:

> *It is not the function of a hospital to discuss with a patient risks and benefits of a procedure; this duty lies with the physician.* See *Ritter v. Delaney*, 790 S.W.2d 29, 31 (Tex.App. – San Antonio 1990, writ

> denied); *Nevauex v. Park Place Hosp., Inc.*, 656 S.W.2d 923, 925 (Tex.App. – Beaumont 1983, writ ref'd n.r.e.) (*The duty to obtain informed consent in Texas is that of the physician*); *Weiser v. Hampton*, 445 S.W.2d 224, 231 (Tex.Civ.App. – Houston [1st Dist.] 1969, writ ref'd n.r.e.) Thus, *Methodist did not have a duty to obtain informed consent from Gibson.* (Emphasis added.)

*Gibson*, 822 S.W.2d at 101.

In *Boney v. Mother Frances Hosp.*, 880 S.W.2d 140 (Tex. App. – Tyler 1994, writ denied), the court said:

> As to the first two points of error informed consent causes of action against health care providers are governed by the Texas Medical Liability and Insurance Improvement Act. TEX.REV.CIV.STAT.ANN." art. 4590i (Vernon Supp.1989). They are negligence actions. *McKinley v. Stripling*, 763 S.W.2d 407, 409 (Tex.1989). *Thus, for the plaintiff to prevail, there must be a duty by the Hospital to disclose medical risks and possible complications that could arise from the surgery as well as secure written informed consent to the surgical procedure from the patient.*
>
> *In Texas, this duty is imposed solely upon the treating doctor; it is his non-delegable duty. The hospital has no such duty of disclosure of medical or surgical risks, nor is it required to secure a patient's informed consent prior to surgery. Gibson v. Methodist Hospital*, 822 S.W.2d 95 (Tex.App. – Houston [1st Dist.] 1991, writ denied); *Ritter v. Delaney*, 790 S.W.2d 29, 31 (Tex.App. – San Antonio 1990, writ denied); *Nevauex v. Park Place Hospital, Inc.*, 656 S.W.2d 923, 925 (Tex.App. – Beaumont 1983, writ ref'd n.r.e.); *see Urgan v. Spohn*, 869 S.W.2d 450, 452 (Tex.App. – Corpus Christi 1993, writ

> denied). *Boney*, 880 S.W.2d at 142-143. (Emphasis added.)

In *Ritter v. Delaney*, 790 S.W.2d 29 (Tex. App. – San Antonio 1990, writ den'd), the court said (p. 31):

> Here, as in *Nevauex*, which considered § 6.02 of the Act in its decision, we recognize that it is the duty of the treating physician, and not the hospital, to secure the informed consent of the patient. *See Nevauex v. Park Place Hosp.*, 656 S.W.2d 923, 925 (Tex.App. – Beaumont 1983, writ ref'd n.r.e.); *Johnson v. Whitehurst*, 652 S.W.2d 441, 445 (Tex.App. – Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Forney v. Memorial Hosp.*, 543 S.W.2d 705, 707 (Tex.Civ.App. – Beaumont 1976, writ ref'd n.r.e.); *Ross v. Sher*, 483 S.W.2d 297, 301 (Tex.Civ.App. – Houston [14th Dist.] 1972 writ ref'd n.r.e.); *Weiser v. Hampton*, 445 S.W.2d 224, 231 (Tex.Civ.App. – Houston [1st Dist.] 1969, writ ref'd n.r.e.) (emphasis added).

*See also Nevauex v. Park Place Hosp., Inc.*, 656 S.W.2d 923, 925 (Tex. App. – Beaumont 1993, writ refused n.r.e.); *Johnson v. Whitehurst*, 652 S.W.2d 441, 444 (Tex. App. – Houston [1st Dist.] 1983, writ refused n.r.e.).

**3. Plaintiff's claims are also governed and barred by the provisions of § 6.02 and § 12.01(a) of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i and such statute is not unconstitutional.**

A hospital is among the persons and entities specifically listed in the definition of a "Health care provider" in § 1.03(a)(3) of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i.

§ 1.03(a)(4) provides:

(4) Health Care Liability claim means a cause of action against a health care provider of physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care, or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

§ 6.02 provides:

*In a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.* (Emphasis added.)

§ 12.01(a) provides:

*Notwithstanding any other law, no provisions of Sections 17.41-17.63, Business & Commerce Code, shall apply to physicians or health care providers as defined in Section 1.03(3) of this Act, with respect to claims for damages for personal injury or death resulting, or alleged to have resulted, from negligence on the part of any physician or health care provider.* (Emphasis added.)

It is well settled by a number of Texas Supreme Court and other Texas Appellate Court decisions that regardless of how Plaintiff's claims are worded or attempted to be cast by Plaintiff in his pleadings, that a claim under the

DTPA against a physician or other health care provider which is grounded upon alleged negligence (as distinguished from a claim based upon express warranty) is barred under the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 12.01(a).

Among numerous cases so holding are *MacGregor Medical Ass'n v. Campbell*, 985 S.W.2d 38, 39-40 (Tex. 1998); *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994); *Walden v. Jeffrey*, 907 S.W.2d 446(1) (Tex. 1995); *Gormley v. Stover*, 907 S.W.2d 448, 450 (Tex. 1995); *Mulligan v. Beverly-Enterprises Texas*, 954 S.W.2d 881, 883-884 (Tex. App. – Houston [14th Dist.] 1997, no writ); *Tajchman v. Giller*, 938 S.W.2d 95, 100-101 (Tex. App. – Dallas 1996, writ denied); *Wright v. Fowler*, 991 S.W.2d 343, 352 (Tex. App. – Fort Worth 1999, no writ to date); *Hall v. Dow Corning Corp.*, 114 F.3d 73, 78 (5th Cir. 1997) appealed from Southern District of Texas.

In the case at bar, there can be no contention that Plaintiff's claims against Defendants, including Defendant Methodist Hospital, are based upon express warranty as distinguished from negligence.

Quite to the contrary, Plaintiff's alleged claim against Defendants in this case basically is the assertion that the Deceased and his family were never advised by Defendants of the Deceased's alleged poor prognosis and that the treatment intent was "palliative" only. Clearly this is not a claim based upon an express warranty but a claim based upon alleged failure to conform to the accepted and required standard of care by Defendants, which is a claim based upon negligence.

As noted above, Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, § 6.02 specifically provides that where the suit against a physician or health care provider involving a health care liability claim is based upon the failure of the physician or health care provider to disclose or adequately disclose the risks or hazards involved in the medical care rendered by the physician or health care provider "**** the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent."

This is precisely the contention of the Plaintiff in the case at bar and § 12.01(a) of article 4590i specifically provides that no provisions of the DTPA (namely §§ 17.41-17.63 of the Texas Business and Commerce Code) shall apply with respect to claims for damages for personal injury or death resulting or alleged to have resulted from the negligence on the part of any physician or health care provider.

Thus, Plaintiff's alleged claim against Defendant Methodist and the other defendants are clearly barred and precluded by the provisions of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, as a matter of law.

Respondent submits that the provisions of art. 4590i in issue here are clearly constitutional. Section 6.02 and section 12.01(a) of Vernon's Texas Revised Civil Statutes Annotated, art. 4590i, do nothing more than eliminate medical malpractice claims based upon negligence from the purview of the Texas DTPA.

Vernon's Texas Revised Civil Statutes Annotated, art. 4590i in no way deprives or even affects a patient's right to refuse medical treatment and in no way restricts a plaintiff's common-law cause of action for fraud (in cases where there is a basis for a common-law cause of action for fraud) in violation of Fourteenth Amendment to the United States Constitution.

## CONCLUSION AND PRAYER

No Federal issue was timely raised or decided by the Texas courts. This case presents no Federal constitutional or other Federal issue with respect to Respondent Methodist Hospital. The Texas court's decision with respect to Respondent Methodist Hospital is based first and primarily upon state law and was correctly decided. The Petition for a Writ of Certiorari should be denied.

WHEREFORE, PREMISES CONSIDERED, Respondent Methodist Hospital, d/b/a Hodges Cancer Center, prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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No. 01-626

Supreme Court, U.S.
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In The

# Supreme Court of the United States

MARY JOHNSON, Individually and as Representative of the ESTATE of BILLY D. JOHNSON, DECEASED,

*Petitioner,*

v.

H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL d/b/a METHODIST HOSPITAL MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC and HODGES CANCER CENTER,

*Respondents.*

**On Petition For Writ Of Certiorari To The Seventh District Court Of Appeals Amarillo, Texas**

## RESPONDENTS' H. GRANT TAYLOR, M.D., LUBBOCK METHODIST HOSPITAL d/b/a METHODIST HOSPITAL MEDICAL GROUP d/b/a LUBBOCK DIAGNOSTIC CLINIC BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether the intermediate Texas court of appeals, in holding that the state's medical malpractice act bars fraud and deceptive trade practice claims disguised as medical malpractice claims, raised an important question of federal law which should be settled by this Court, or is a ruling on an important federal question that conflicts with relevant decisions of this Court?

## LIST OF PARTIES

The caption of the case includes the names of all parties.

Respondent, Lubbock Diagnostic Clinic is a trade name of Methodist Medical Group, which is a trade name of Lubbock Methodist Hospital.

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for Writ of Certiorari. The state courts below held that Petitioner's fraud and deceptive trade practices claims were preempted by Article 4590i of the Texas Revised Civil Statutes (Vernon 2001), and disallowed fraud or deceptive trade practice claims disguised as medical malpractice claims. That holding is a simple construction of a state statute, does not conflict with precedent from the Supreme Court, and raises no substantial federal question.

## OPINIONS BELOW

The opinion of the Seventh District Court of Appeals for the State of Texas, entered December 13, 2000, is unpublished, and is reprinted in Appendix A to the Petition for Writ of Certiorari. The Judgment Nunc Pro Tunc and Order of Severance, wherein the trial court granted the motions for summary judgment of Respondents H. Grant Taylor, M.D., Methodist Medical Group, and Hodges Cancer Center, was signed by the trial court on July 21, 1999, and is reprinted as Appendix B to the Petition for Writ of Certiorari. The letter order of the Supreme Court of Texas denying the Petition for Review, dated May 17, 2001, is reprinted as Appendix C to the Petition for the Writ of Certiorari. The letter order of the Supreme Court of Texas denying the Motion for Rehearing, dated July 12, 2001, is reprinted as Appendix D to the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

This is a case involving allegations of medical malpractice disguised as claims of fraud and violations of the Deceptive Trade Practices-Consumer Protection Act ("DTPA"), Tex. Bus. & Comm. Code Ann. §§ 17.41-17.63 (Vernon 1987). (CR1:3-6). Mary Johnson, Individually and as Representative of the Estate of Billy D. Johnson, deceased, filed this lawsuit against H. Grant Taylor, M.D. ("Dr. Taylor") and Lubbock Methodist Hospital Practice Management Services, Inc., d/b/a Methodist Medical Group, d/b/a Lubbock Diagnostic Clinic ("MMG") among other defendants. (CR1:3).

Petitioner's Original Petition alleges that Petitioner's Decedent, Billy Dewayne Johnson, was diagnosed with metastatic adenocarcinoma with unknown primary in 1996. (CR1:4). She further alleges that Dr. Taylor of Oncology Hematology Associates and MMG referred Mr. Johnson to John P. Lytle, Jr., M.D. and Methodist Hospital, Lubbock, Texas d/b/a Hodges Cancer Center of Methodist Hospital for radiation therapy. (CR1:4-5). Dr. Taylor wanted Dr. Lytle to perform radiation therapy on the lesion on Mr. Johnson's right shoulder blade. Dr. Taylor believed that Mr. Johnson's situation was curable. Dr. Lytle also believed that the prognosis of Mr. Johnson, with regard to his overall disease, would get better at some point. Dr. Lytle based his decision to provide radiation therapy to Mr. Johnson upon the recommendation from Dr. Maale, another one of Mr. Johnson's treating physicians.

Dr. Lytle further made an independent decision separate and apart from the recommendations of Drs. Taylor

and Maale to offer Mr. Johnson radiation therapy. Mr. Johnson executed a Radiation Therapy Disclosure and Consent Form giving Dr. Lytle, as his physician, together with health care providers involved, permission to treat his condition which was explained to him to be cancer. Dr. Lytle further testified that he discussed Mr. Johnson's prognosis with him and his family. Dr. Lytle also testified that the decision to undergo radiation treatment was a decision made by himself and Mr. Johnson.

The Original Petition alleges that there is no treatment for metastatic adenocarcinoma with unknown primary and that neither the patient nor his family were notified of the patient's poor prognosis and that the radiation treatment intent was "palliative" only. Petitioner's pleading further alleges that the Respondents failed to disclose information known at the time of the transaction in question with the intent to induce Mr. Johnson to receive treatment he would not have agreed to had such information been disclosed. (CR1:5). The Original Petition alleges that such actions are a violation of common law fraud and the DTPA. (CR1:5).

Dr. Taylor and MMG filed their Motions for Summary on Judgment on the following grounds:

1. This is a medical malpractice case governed by Texas Revised Civil Statute art. 4590i and cannot be sustained under the DTPA as pled by Petitioner;

2. Petitioner lacked standing to bring a DTPA claim individually and on the behalf of the Estate of Billy D. Johnson, Deceased because such a claim does not survive the death of Mr. Billy D. Johnson; and

3. Nothing Dr. Taylor did or failed to do was the proximate or producing cause of any injuries or damages to the Plaintiff. (CR1:72-87).

Respondent Methodist Hospital, Lubbock, Texas, d/b/a Hodges Cancer Center ("Methodist") subsequently filed its Motion for Summary Judgment. (CR1:25).

Dr. John P. Lytle, Jr., M.D. was nonsuited by the Petitioner. (CR1:15-16). The claims against Respondent Oncology Hematology Associates have been severed from this cause. (CR2:522-23).

The trial court granted the Motions for Summary Judgment and rendered take nothing judgments in favor of those Respondents filing Motions for Summary Judgment. (CR2:517).

Petitioner, Mary Johnson, Individually and as Representative of the Estate of Billy D. Johnson, Deceased now brings this appeal from the summary judgments rendered in favor of Dr. Taylor, MMG and Methodist.

## SUMMARY OF THE ARGUMENT

The informed consent provisions of the Texas Medical Liability and Insurance Improvement Act ("the Act"), Tex. Rev. Civ. Stat. Ann. Article 4590i, § 12.01 and § 6.02 (Vernon 2001), bar the health care liability claims asserted in this case which Petitioner has attempted to disguise as

fraud and deceptive trade practices causes of action. Furthermore, Petitioner has failed to demonstrate any reasons why this Court should exercise jurisdiction to hear this case pursuant to Supreme Court Rule 10(c).

## ARGUMENT

### A. Petitioner untimely and improperly raised the federal questions asserted in her Petition for Certiorari. Therefore, such arguments are waived.

A federal question must be raised in a proper and timely manner in the state courts in order to preserve the ability to raise them before this Court. The timeliness with which the federal question is raised in the state court is largely a matter for the state to regulate by its own procedural rules. Failure to raise the federal question at the stage of the proceedings required by state law will preclude review. *Edelman v. California*, 344 U.S. 357, 358-59 (1953).

Under Texas law, Petitioner's federal questions must have been asserted in the trial court in order to be raised on appeal. *Wood v. Wood*, 320 S.W.2d 807, 813 (Tex. 1959). In the instant case, the Petitioner failed to raise her federal questions until she filed her motion for rehearing to the Supreme Court of Texas. This Court has clearly ruled that it is too late to raise a federal question through a petition for rehearing to a state appellate court, *Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935), except when the decision of that court unexpectedly gives rise to a federal question which the party seeking review had no previous

opportunity to assert, and could not fairly have anticipated. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

As set forth in the Statement of the Case, *supra*, Petitioner did not face an unexpected decision of the Supreme Court of Texas which gave rise to a federal question which she had no previous opportunity to assert, nor could she have fairly anticipated. *Id.* Therefore, Petitioner's presentation of her federal question to this Court is waived as untimely pled. Petitioner's reliance upon this Court's opinion in *Erie R.R. v. Purdy*, 185 U.S. 148, 153 (1902), is misplaced, because the Court ultimately held that

> [n]ow, where a party drawing in question in this court a state enactment as invalid under the Constitution of the United States, . . . did not raise such action . . . in the trial court, this court cannot review such final judgment, . . . if that court did nothing more than decline to pass upon the federal question because not raised in the trial court as required by the state practice.

*Id.* at 154 (citations omitted). Therefore, Petitioner waived her federal claims for failure to timely assert them in the state courts below.

**B. Petitioner's claims are barred because the state-court decision below rested upon adequate and independent state grounds.**

Even if Petitioner's federal question was timely raised in the state courts below, this Court should deny review because the complained-of state court judgment

was based on adequate and independent state grounds. As Justice Jackson stated:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.*** The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

*Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (citations omitted).

A bedrock principle of federalism is that "state courts are the ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). As the Court can see from the intermediate state court of appeals decision found in Appendix A of the Petition for Writ of Certiorari, the court of appeals below decided this case exclusively on state law grounds, and never reached a federal question. Thus, the state court of appeals judgment rests on independent and adequate state grounds which this Court cannot review. *Johnson v. New Jersey*, 384 U.S. 719, 735-36 (1966).

**C. Petitioner's arguments fail on the merits.**

Even if the Court finds that Petitioner's federal questions were timely raised, and that the decision of the court below did not rely on independent and adequate state grounds, Petitioner's claims that the Texas informed-consent statute violates her Fourteenth Amendment privacy rights and access to courts rights under the Texas Constitution fail on the merits.

Recovery for a claim that a doctor failed to fully inform a patient of the risks of a course of treatment is governed by the Medical Liability and Insurance Improvement Act ("the Act"). Tex. Rev. Civ. Stat. Ann. & art. 4590i, § 6.02 (Vernon 2001). Petitioner's first reason in support of her petition states that the Act allegedly violates an individual's constitutionally protected right to refuse medical care under the Fourteenth Amendment. While it is true that the right to refuse treatment is a corollary of the doctrine of informed consent, and that competent individuals have a right to refuse medical treatment, *Cruzan v. Director, Mo. Dept. Health*, 497 U.S. 261, 270 (1990), the Act does not infringe upon Petitioner's right to refuse treatment.

Although a person's right to informed consent implicates a fundamental privacy right, the procedures in the Act do not denigrate either the ability to give knowledgeable consent to medical procedures, or the remedies available when correct risk disclosure is not made. All the Act does is prescribe the type of legal remedy available to an aggrieved party – a cause of action arising under negligence, rather than a claim for fraud or violation of the DTPA. Thus, the Act's informed-consent procedure does not violate an individual's privacy rights under the

Fourteenth Amendment. U.S. Const. amend. XIV; *Penick v. Christensen*, 912 S.W.2d 276, 286 (Tex. App. – Houston [14th Dist.] 1996, writ denied).

Petitioner's last argument in support of review alleges that the Act violates the open courts provision of the Texas Constitution. Tex. Const. art. I, § 13. That constitutional provision states: "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.* Medical malpractice victims have a well-defined common law cause of action to sue for damages. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988). However, "no one has a vested right in the continuance of present laws in relation to a particular subject. . . . " *Middleton v. Texas Power & Light Company*, 185 S.W. 556, 560 (1916). The Texas legislature has the power to change and even repeal common law causes of action. *Id.* As long as this action is not exercised arbitrarily or unreasonably, and the legislature enacts reasonable substitutes for remedies it has withdrawn, legislative preemption of causes of action such as fraud and DTPA claims under the Act pass muster under the Texas Constitution's open courts provision. *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (1955).

The legislature did not abrogate Petitioner's ability to obtain a legal remedy for a violation of his right to informed consent. The Texas legislature enacted a reasonable substitute for common law informed consent actions such as claims under fraud and the DTPA, when it commanded that such claims can only be asserted as negligence claims under the Act. Thus, because the substance of the right to a jury trial is maintained under the Act, the

procedures used are within the discretion of the legislature, the informed-consent provision of the Act does not violate the open courts provision of the Texas Constitution. *Texas Workers Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 529 (Tex. 1995).

## CONCLUSION

Petitioner's federal question was untimely asserted and therefore waived in the proceedings below. Furthermore, the state-court judgment rested upon an independent and adequate state ground, thereby denying this Court's ability to review that judgment. And finally, the informed-consent provision of the Act does not violate Petitioner's rights under the Fourteenth Amendment to the United States Constitution, or the open courts provision of the Texas Constitution. Thus, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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